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# Mortgage Foreclosure Proceedings: Where We Have Been and Where We Need to Go

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**MORTGAGE FORECLOSURE PROCEEDINGS:  
WHERE WE HAVE BEEN AND WHERE WE NEED TO GO**

*Bryan E. Meek\**

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Owning a home is often referred to as the quintessential American dream; however, for many Americans this dream may be coming to an end. In the coming years, approximately five million homeowners will go through the frightening and confusing process of foreclosure.<sup>1</sup> Since 2008, nearly four million homeowners have already been through this horrifying experience, with some unjustly losing their homes.<sup>2</sup> There is hope for the future. Changes in laws and regulations may help to alleviate the foreclosure process, and these changes may enable many Americans to keep the dream alive.

The foreclosure process has changed drastically over the years. Some scholars conclude that the older procedures and standards for conducting a foreclosure were more efficient, clear, and treated both parties fairly; however, the modern foreclosure proceedings, varying by state, are complicated and plagued with fraud, partly because of the increase in popularity of the secondary mortgage market.<sup>3</sup> In recent years, unidentifiable entities filing foreclosure complaints were blamed for causing many of the foreclosure confusion today. One company in particular, Mortgage Electronic Registration Systems, Inc. (MERS), once claimed to have title to nearly half of the mortgages being filed today.<sup>4</sup> However, oftentimes the homeowner has not entered into a

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1. Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 399 (2013) (stating that during this current economic crisis, nearly 1.5 million foreclosures are being filed every year); see also Jonathan Stempel, *Top Massachusetts Court Limits Foreclosure Relief*, REUTERS (June 22, 2012, 4:15 PM), <http://www.reuters.com/article/2012/06/22/us-massachusetts-foreclosures-idUSBRE85L18I20120622> (providing more in-depth foreclosure statistics).

2. Davidson, *supra* note 1, at 391.

3. *Id.* at 413.

4. Laura A. Steven, Note, *MERS and the Mortgage Crisis: Obfuscating Loan Ownership and the Need for Clarity*, 7 BROOK. J. CORP. FIN. & COM. L. 251, 251 (2012); see also Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES (Mar. 5, 2011), <http://www.nytimes.com/2011/03/06/business/06mers.html?ref=mortgageelectronicregistrationsystemsinc> (providing statistics on the number of transactions in which MERS has become involved).

mortgage agreement with these unidentifiable entities.<sup>5</sup>

Many predicted this confusion during the early years of the crisis.<sup>6</sup> Therefore, to combat the flawed process, some states started taking a proactive approach by streamlining the system and increasing the requirements for the mortgagee, while also providing defenses to the mortgagors.<sup>7</sup> However, too few states have made the proper changes to the foreclosure proceeding process. With the hopes of keeping homeowners from unjustly losing their homes, now is the time for states that have yet to adapt to provide the needed solutions required to handle the procedural problems.<sup>8</sup>

The primary purpose for this comment is to provide an overview of the foreclosure process while introducing the laws and regulations that would govern an “ideal” foreclosure system. First, it provides a general introduction to the mortgage/foreclosure process. This introduction is crucial; it will help many to understand the way financial institutions have complicated the foreclosure process. Next, it analyzes various states, labeling them as either having “strict” foreclosure laws and regulations or having “lenient” foreclosure laws and regulations. Lastly, this comment discusses the pros and cons of various foreclosure requirements. The ultimate goal of this comment is to establish a set of standards that states and courts should implement in order to provide for a fair, efficient, and comprehensive foreclosure process. Ultimately, this comment advocates for less stringent standing requirements, more court involvement in the foreclosure process, and mandatory mediation.

## I. THE FORECLOSURE CRISIS IN AMERICA

Before the advent of the current mortgage financing system, homeowners enjoyed a personal relationship with their banks. The banks, as lenders, personally managed the loan, the record keeping, and the collection of payments.<sup>9</sup> This relationship afforded a more defined and efficient foreclosure process, since the original bank that financed the home was also the bank that brought the foreclosure action.<sup>10</sup>

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5. Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: the Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 118-19 (2013).

6. Gerald Korngold, *Proposed Regulatory Solution: Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 727 (2009).

7. Davidson, *supra* note 1, at 399.

8. *Id.*

9. Lydia Nussbaum, *ADR's Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1893 (2013).

10. *Id.*

Furthermore, in the event that a homeowner defaulted on a loan, the original bank was more likely, as a result of personal incentives, to modify the loan. This modification prevented community blight in the towns where the banks operated, which helped the banks maintain a positive image in the community.<sup>11</sup>

Under this former system, if an institution assigned or transferred a note or mortgage, a county department kept records of the mortgage transfers and assignments, allowing homeowners to easily determine which entity owned the debt and had rights to enforce the mortgage.<sup>12</sup> However, the downfall of this system began in the 1970s.<sup>13</sup>

When mortgage securitization and secondary mortgage markets became popular in the late 1970s, the mortgage market abandoned the traditional model.<sup>14</sup> The new market developed as the “baby-boomers” first began to purchase homes. The dramatic increase in homeownership forced financial institutions to realize that many local banks lacked the sufficient capital needed to fund the growing demand for home mortgage loans.<sup>15</sup> As a result, investment banks began bundling several mortgages together, then issuing securities on these bundles, usually in the form of bonds.<sup>16</sup> These bonds represent the holder’s right “to receive certain payments under the mortgages.”<sup>17</sup> The security interests are then traded as securities on the open market.<sup>18</sup> Put simply, “securitization is the process of utilizing mortgage loans to back investment instruments.”<sup>19</sup> This system, in the beginning, allowed for more capital to finance the growing demand for home loans.<sup>20</sup> Unfortunately, this modern system, which enabled more people to purchase homes, was one of the direct causes of the current mortgage crisis.<sup>21</sup>

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11. *Id.* at 1894 (discussing the ramifications for a bank in the event of default by many homeowners). The bank was aware of the monetary consequences to the institution and was also aware of the ramifications to the community. *Id.*

12. See Paul McMorrow, *A New Act in Foreclosure Circus*, BOSTON GLOBE (Jan. 14, 2011), [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2011/01/14/a\\_new\\_act\\_in\\_foreclosure\\_circus/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/01/14/a_new_act_in_foreclosure_circus/) (describing a system that has been characterized as one in which financial institutions buy, sell, and trade mortgages and promissory notes as if they were baseball cards).

13. Nussbaum, *supra* note 9, at 1896.

14. *Id.*

15. Nussbaum, *supra* note 9, at 1896.

16. *Id.*

17. Korngold, *supra* note 6, at 729.

18. *Id.*

19. Renuart, *supra* note 5, at 128.

20. Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1210 (2012).

21. *Id.*

### A. *The Foreclosure Process*

In order to understand the collapse of the housing market and the role of the securitization process in contributing to the collapse, it is crucial to discuss the operation of the foreclosure process. A foreclosure is defined as a “legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender. . .either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.”<sup>22</sup>

For a majority of the population, in order to purchase a home, one must obtain a mortgage loan. A financial institution issues a loan to the potential homeowner, along with an accompanying promissory note for the loan, and a mortgage document is signed. In the event a homeowner is unable to make payments per the terms of the note, a foreclosure proceeding may be commenced.

Essentially, the purpose of a foreclosure is to allow the financial institution, a mortgagee, to sell or convey the property in order to recover money owed on the debt that was secured by the mortgage; basically, the house is used as collateral.<sup>23</sup> A loan in the form of a mortgage typically consists of two documents to secure the principle balance given to the future homeowner: a note and a security instrument (mortgage).<sup>24</sup> The note represents the legal obligation of the homeowner to repay the money advanced to him or her in order to purchase the home.<sup>25</sup> The mortgage document represents the financial institution’s security or collateral in the note; meaning, the mortgage “creates a security interest in the borrower’s real property and permits the mortgagee or beneficiary to foreclose in the event of non-payment or a breach of other duties.”<sup>26</sup>

In most cases following the default of the note, the financial institutions may require an acceleration of the balance of the note, demanding the immediate payment of the remainder still owed under the note. Depending on the jurisdiction, the financial institution may be required to give notice of the default, usually through a foreclosure action, prior to accelerating the balance.<sup>27</sup> A failure to pay the remaining

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22. William M. Howard, Annotation, *Necessity of Production of Original Note Involved in Mortgage Foreclosure—Twenty-First Century Cases*, 86 A.L.R. 6th 411, § 2.

23. *Id.*

24. Renuart, *supra* note 5, at 131 (citing GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5.27 (5th ed. 2007)).

25. *Id.*

26. *Id.* (citing RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.03 (Michael Allan Wolfe ed., LexisNexis Matthew Bender 2009)).

27. Howard, *supra* note 22, § 3.

balance on the note may result in the financial institution taking the property to pay off the balance: a foreclosure.<sup>28</sup> Typically, the party bringing the initial foreclosure action is the one that owns the debt or obligation.<sup>29</sup> However, some jurisdictions allow uninterested parties, such as a nominee mortgagee like MERS, to bring the foreclosure action—a concept that is explored in this comment.

### *B. The Collapse and the Potential Causes*

During the formative years of the mortgage securitization market, the security packages were typically packaged based on a single bank's prime mortgages.<sup>30</sup> However, as the demand for mortgage-backed securities increased over time, the low-risk packages were expanded to include not only more banks, but also sub-prime, high-risk mortgages.<sup>31</sup>

In 2006, after nine years of growth and consistent increases in home prices,<sup>32</sup> this growth rapidly declined.<sup>33</sup> From 1997 to 2001, housing appreciations stayed relatively steady at 6%.<sup>34</sup> However, from 2001 to 2005, there was an enormous increase in appreciation rates, and by 2005, the rates had increased beyond 12%.<sup>35</sup> In 2007, the rates fell below zero, the burst of the bubble.<sup>36</sup>

The theories and explanations behind this collapse are plentiful.<sup>37</sup> Given this lack of consensus, a few of the more prominent theories shall be noted. First, one of the more popular theories blames the increase in demand for home ownership on the consistent increase in home prices and the decrease in interest rates.<sup>38</sup> As a second theory, some were quick to blame the Community Reinvestment Act, which was passed in 1977.<sup>39</sup>

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28. *Id.*

29. *Id.* § 2.

30. Korngold, *supra* note 6, at 730 (citing Brooke Masters & Saskia Scholtes, *Payback Time*, FIN. TIMES (Aug. 9, 2007, 3:00 AM), <http://www.ft.com/cms/s/0/1f7200ca-4611-11dc-b359-0000779fd2ac.html#axzz3LFTMhu2K>).

31. *Id.*

32. Davidson, *supra* note 1, at 397 (citing ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* 32 (1st ed. 2008)).

33. *Id.* at 398.

34. Levitin, *supra* note 21, at 1210.

35. *Id.*

36. *Id.*

37. *Id.* at 1211-12 (noting that the lack of consensus is attributed to the fact that the probability was high for multiple causes of the collapse, and it is unknown if any factor was more relevant than others).

38. *Id.*

39. *Id.* at 1214.

While this act did not directly require financial institutions to give out an increased number of loans, the act established a practice whereby financial institutions were evaluated based on their ability and willingness to serve low to moderate-income borrowers, a higher risk group.<sup>40</sup> As a result, banks had an incentive to provide mortgage loans to lower income families. A third theory is that changes to the aims of the Affordable Housing Act contributed to the collapse.<sup>41</sup> These changes pushed for more housing options for low-to-moderate income borrowers as well as more housing options for underserved areas, while encouraging “special-affordable multifamily units.”<sup>42</sup> As a fourth theory, one particular economist contributes the collapse to the Federal Reserve, which allegedly kept the interest rates too low for an unwarranted period of time; these low interest rates explain the increase in demand for mortgages, as the interest rates allowed for cheaper mortgage credit.<sup>43</sup> Fifth, the relaxed standards of both the securitization market and foreclosure process may have contributed to the formation of the mortgage/housing bubble.<sup>44</sup> Some of these relaxed standards include mispriced risk of mortgage credit and credit applications that did not require strict qualification standards, partially as the result of growth of the mortgage market due to the expansion of mortgage securitization.<sup>45</sup>

### *C. The Mortgage Electronic Registration System (MERS)*

The organization known as Mortgage Electronic Registration System (MERS), adds further confusion to an already complicated system.<sup>46</sup> Created in 1993, MERS is a national record system;<sup>47</sup> however, even to this day, little is known about this organization or the ramifications of its services.<sup>48</sup> Essentially, MERS acts as a record-keeper that maintains a “private registry of mortgages.”<sup>49</sup> Member institutions that own mortgage loans designate MERS as a nominal mortgagee to a

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40. *Id.*

41. *Id.* at 1218.

42. *Id.* at 1219 (citing 12 U.S.C. §§ 4562-4565 (2008)).

43. *Id.* at 1222 (citing JOHN B. TAYLOR, GETTING OFF TRACK: HOW GOVERNMENT ACTIONS AND INTERVENTIONS CAUSED, PRO-LONGED, AND WORSENERED THE FINANCIAL CRISIS 4 (2009)).

44. *Id.* at 1226.

45. *Id.* at 1226-28.

46. Steven, *supra* note 4, at 251; see also Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and The Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1378 (2010).

47. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 490 (Minn. 2009).

48. Peterson, *supra* note 46, at 1361.

49. Davidson, *supra* note 1, at 401.



specific loan; “MERS does not *originate, lend, service, or invest* in home mortgage loans.”<sup>50</sup> It acts as a recording system that allows its members to transfer and assign mortgage loans “without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located.”<sup>51</sup> This recording displays MERS as the mortgagee, as opposed to the actual lending institute.<sup>52</sup> The member organizations allow MERS to record the transfers and assignments in MERS’ system. The purpose is to increase efficiency and profitability that occurs in each transfer.<sup>53</sup> After a member entity registers its mortgage transfers, MERS becomes and remains the name on the mortgage in the public records.<sup>54</sup>

Historically, under the traditional recording system, “the originating lender made a traditional mortgage loan by listing itself as the payee on the promissory note and as the mortgagee on the security instrument”; subsequently, “[t]he loan [was] then assigned to a seller for repackaging through securitization for the investor[,]” and all transfers [were] recorded in local offices.<sup>55</sup> However, under the current MERS system, the original financial institution “pays MERS a fee to record an assignment to MERS in the county records.”<sup>56</sup>

What incentive do financial institutions have to subscribe to MERS’ services? MERS monitors and follows each mortgage assignment, which “saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans.”<sup>57</sup> However, it is important to note that during this process MERS never negotiates, enters into, or communicates with the mortgagor/homeowner.<sup>58</sup> Lastly, according to MERS itself, MERS does not physically hold any documents for any of its subscribers, including the mortgage document and the note.<sup>59</sup>

Equipped with a background to the mortgage system, the

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50. *Jackson*, 770 N.W.2d at 490.

51. *Id.*

52. Peterson, *supra* note 46, at 1361-62 (discussing how MERS will then remain as the name on the loan for the life of the mortgage, even after assignment or transfer to another entity, essentially making the securitization process easier).

53. *Jackson*, 770 N.W.2d at 490.

54. Davidson, *supra* note 1, at 401.

55. Peterson, *supra* note 46, at 1370.

56. *Id.*

57. *Jackson*, 770 N.W.2d at 490 (quoting MERS).

58. *Id.*

59. See generally *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009) (noting that MERS is not and does not hold itself out to be the owner or holder of the mortgage documents or promissory note documents).

foreclosure process, and mortgage servicing entities, one may begin to analyze a common foreclosure scenario.

## II. A COMMON FORECLOSURE SCENARIO

For many Americans, the typical situation resulting in a foreclosure process is the same: a default of the home mortgage loan under the terms of a note. However, such a simple concept of using a lien on a home to repay a promissory note can be filled with many nuisances and complications. Foreclosure complaints come with various nuisances because of the use of securitized loans and the consistent buying and selling of a single mortgage loan. A more simplified explanation of the concepts and principles in this comment is found in a typical foreclosure fact scenario from a recent Ohio case.<sup>60</sup>

In 2006, two potential homeowners went to a local bank with the intent to purchase a home, by way of a mortgage, and they were able to obtain a mortgage worth \$251,250 from Legacy Mortgage.<sup>61</sup> The approved homeowners signed, separately, both a promissory note and a mortgage, which ultimately granted Legacy Mortgage a security interest to the property.<sup>62</sup> Therefore, the bank and homeowners entered into two separate agreements: (1) the promissory note, with both signatures from the homeowners and signatures from Legacy Mortgage, and (2) the mortgage document, with both signatures from the homeowners and signatures from Legacy Mortgage.<sup>63</sup>

Following the execution of both documents, the homeowners obtained the necessary funding to purchase their home.<sup>64</sup> However, subsequent to the signing of the promissory note and mortgage document, Legacy Mortgage signed over the promissory note, through an endorsement to Wells Fargo.<sup>65</sup> Unfortunately, like many Americans in 2008, hard times fell upon the homeowners.<sup>66</sup> They contacted Wells Fargo after receiving information on the default in payments, and both contracting parties, including Wells Fargo, agreed to a short sale in an attempt to settle the default with the bank; both parties agreed to a short

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60. *See generally* Fed. Home Loan Mortg. Corp. v. Schwartzwald, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. (This is one of the more recent cases that has come out of Ohio, decided by the Supreme Court of Ohio, where the Court decided the issue of standing when various transfers and assignments took place under the promissory note and mortgage.)

61. *Id.* at ¶ 5.

62. *Id.*

63. *Id.*

64. *See id.*

65. *Id.*

66. *See id.* at ¶ 6.

sale in the amount of \$259,900, closing in June 2009.<sup>67</sup>

About the same time the short sale contract was entered into, to the surprise of the homeowners, a company called Federal Home Loan Mortgage Corporation (FHLM) filed a complaint against the homeowners and accelerated the cost of the loan, an amount of approximately \$245,085.18.<sup>68</sup> However, FHLM did not have a copy of the promissory note, nor is there evidence that it was made aware of the short sale agreement.<sup>69</sup> After addressing this confusion with Wells Fargo, Wells Fargo assured the homeowners that it was a technicality and the short sale would still proceed.<sup>70</sup>

Despite this reassurance from Wells Fargo, FHLM filed a foreclosure complaint in an Ohio court, alleging the homeowners had defaulted on the loan and owed \$245,085.18, not including the interest, court and attorney costs, and advances.<sup>71</sup> Along with the complaint, FHLM attached a copy of the promissory note, which the homeowners had originally signed, and FHLM attached a blank endorsement from Wells Fargo and included the endorsement from Legacy Mortgage to Wells Fargo.<sup>72</sup> Furthermore, to make matters more confusing, Wells Fargo officially assigned both the note and mortgage to FHLM approximately 3 weeks after FHLM officially filed the foreclosure complaint.<sup>73</sup>

This example shows just how complicated a foreclosure proceeding can become when multiple notes and mortgages are transferred, assigned, and endorsed. There are several variations and nuisances that surround foreclosure proceedings, and this example is just a simple variation to show some of the consequences associated with assignments and transfers.

### III. IF IT'S BROKE, FIX IT: PROBLEMS WITH THE FORECLOSURE PROCESS

As one can see from the discussion above, there are many issues concerning the procedures involved in a foreclosure action. To recap, some of the problems that may plague a party bringing a foreclosure action include: whether the party has possession of one or both of the documents associated with a mortgage loan (the note and the

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67. *Id.*

68. *Id.* at ¶ 7.

69. *Id.*

70. *Id.* at ¶ 8.

71. *Id.* at ¶ 7.

72. *Id.* at ¶ 9.

73. *Id.* at ¶ 10.

security/mortgage document); whether the party has possession of the proper assignment listing the true mortgagee and assignee; and whether MERS is permitted to bring a foreclosure action in that jurisdiction. Unfortunately, many states deal with these issues in very different ways, causing confusion and disorganization in the foreclosure process. For these reasons, this comment calls for a more uniform approach to deal with foreclosures and a change to some of the necessary requirements to bring such an action.

In order to establish which procedural aspects should be re-formatted, this comment first analyzes the issues that currently complicate the foreclosure system. It then analyzes the standards and procedures of different states by classifying them into two categories. The two categories are strict foreclosure requirements and lenient foreclosure requirements, and the classifications are based on the state's level of scrutiny over the institutions that bring the action.

#### *A. Problems with the Current System*

##### *1. Drawbacks of Securitization*

In recent years, the securitization process, an area of law no less complicated than many other areas of transaction law,<sup>74</sup> has been littered with carelessness and fraud.<sup>75</sup> For example, in California between 2009 and 2011, 84 % of the transactions involving mortgages resulted in documentation violations; 27 % of the documents “suggested that the original or prior owner of the mortgage loan may not have signed the [assignment or transfer,] and instead it was signed by an employee or another entity; 11 percent of the time, the assignee signed as the assignor; and, in 6 percent of the files, two or more conflicting assignments were recorded, making it impossible for either to be legally valid.”<sup>76</sup>

During the process of securitization, the note and the mortgage documents often become separated, with one institution receiving the servicing rights to the loan and the other entity receiving ownership of

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74. Davidson, *supra* note 1, at 402.

75. Renuart, *supra* note 5, at 111; *see also* Steven, *supra* note 4, at 257 (citing Floyd Norris, *Some Sand in the Gears of Securitizing*, N.Y. TIMES (Oct. 18, 2010), <http://www.nytimes.com/2010/10/19/business/19norris.html>) (discussing MERS engaging in “quasi-fraudulent practices such as robo-signing”).

76. Renuart, *supra* note 5, at 122 (citing CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE ASSESSOR-RECORDER, FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE 1, 6-7 (2012)).

the mortgage.<sup>77</sup> The purpose for this split is to make the packaging of the mortgages easier to securitize and trade.<sup>78</sup> Furthermore, in an attempt to make the securitization process more efficient, financial entities subscribe to services that participate in acts of “robo-signing.”<sup>79</sup>

The concept of robo-signing further exemplifies problems with the securitized mortgage market. A *robo-signer* is a person “who quickly signs hundreds or thousands of foreclosure documents in a month, despite swearing that he or she has personally reviewed the mortgage documents.”<sup>80</sup> This essentially causes carelessness in the transfer process, whereby the proper documents are not properly signed or included in the package being transferred.<sup>81</sup> The problems associated with robo-signing are so prevalent that many states stopped foreclosure proceedings in order to investigate potential mistakes and fraud.<sup>82</sup>

## 2. Problems Associated with the MERS System

The MERS recording system can be criticized from many different aspects. In fact, some attribute MERS to creating the entire secondary mortgage market that eventually collapsed because it reduced, and almost eliminated, the transaction costs of assigning or transferring ownership in a mortgage.<sup>83</sup> One criticism is that the MERS system creates confusion amongst financial institutions because non-member institutions are not aware of transfers between MERS members.<sup>84</sup> Furthermore, if non-MERS institutions assign or accept assignments from member institutions, the MERS system no longer takes control of the assignment or maintains itself as a mortgagee of record.<sup>85</sup> Another

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77. Steven, *supra* note 4, at 254 (citing Beau Phillips, *MERS: The Mortgage Electronic Registration System*, 63 CONSUMER FIN. L. Q. REP. 262, 263 (2009)).

78. *Id.*

79. For a complete explanation of *robo-signing*, see Renuart, *supra* note 5, at 124-26.

80. Renuart, *supra* note 5, at 125.

81. *Id.* (analyzing *One West Bank, F.S.B. v. Drayton*, 910 N.Y.S.2d 857, 859-69 (N.Y. Sup. Ct. 2010)); see also Gloria J. Liddell & Pearson Liddell, Jr., *The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact upon Stakeholders*, 16 CHAP. L. REV. 367, 384 (2013) (noting that “with this high volume of new loan originators and 8.1 million potential foreclosures, coupled with tens of millions of unrecorded assignments, it is a small wonder that MERS, and mortgage service companies in the name of MERS, had to resort to an assembly line process whereby agents of MERS signed affidavits regarding the propriety of foreclosure documentation without reviewing the loan file”).

82. Renuart, *supra* note 5, at 126.

83. Davidson, *supra* note 1, at 401 (MERS has a role in six out of ten mortgage loans in the United States); see also Brett J. Natarelli & James M. Golden, *The End of the Beginning in the Battle Over MERS*, 65 CONSUMER FIN. L. Q. REP. 400, 401 (2011).

84. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 491 (Minn. 2009).

85. *Id.*

criticism is that in instances where documentation may be necessary for an assignment or transfer, MERS does not draft or handle the documentation maintenance of non-MERS members; instead, MERS encourages the member financial institutions to have an officer become MERS certified, with the authority to sign documents on behalf of MERS, allowing the documents to remain in MERS' name.<sup>86</sup>

Another criticism is that MERS assumes the role as a party conducting foreclosure.<sup>87</sup> In these instances courts have to determine whether MERS has standing to bring a foreclosure action against a homeowner.<sup>88</sup> The reason for the confusion is three-fold. First, MERS does not loan money to the homeowner and no money comes from MERS to be applied to the loan principal.<sup>89</sup> Second, the homeowner never promised to pay MERS any money, including payments on the note, and MERS is not entitled to collect the monthly payments.<sup>90</sup> Third, MERS does not receive any of the money collected at the conclusion of a foreclosure sale; these funds go to the mortgagee that actually owns the note.<sup>91</sup>

Federal courts have established a three-part test to determine standing: (1) an injury in fact, (2) causation, and (3) redressability.<sup>92</sup> When applying this test to MERS, one can clearly see that it may lack standing. MERS has no right to receive payments under the contract, nor should it expect to receive payments from the homeowners; in fact, MERS "makes the same amount of money with respect to the original mortgage agreement whether the borrower repays or not."<sup>93</sup> MERS' label as a "nominal mortgagee" does not provide it with an actual injury, thus it may lack standing to bring the foreclosure action; however, some states do consider MERS as having standing.<sup>94</sup>

Under the traditional standing requirements, MERS would not have standing to bring a foreclosure action in court. However, given that some states allow courts to grant MERS standing, MERS has apparently been granted a "pass" on traditional standing requirements. The concern over MERS' ability to sue has diminished over the last few years, however, as

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86. *Id.*

87. Peterson, *supra* note 46, at 1377-78.

88. *Id.*

89. *Id.* at 1377.

90. *Id.* at 1378.

91. *Id.*

92. *Id.* at 1381 (analyzing Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 273-74 (2008)).

93. *Id.* at 1381-82.

94. *Id.* at 1382.

MERS' has adopted a policy of no longer bringing foreclosure actions.<sup>95</sup>

MERS creates more confusion for homeowners by failing to notify the mortgagors "when ownership of [the mortgage] changes hands."<sup>96</sup> Thus, one of the major issues addressed below in terms of state classification, is how the state's rules and regulations govern MERS and its ability to notify and bring foreclosure complaints against homeowners.<sup>97</sup> The lack of disclosure to homeowners creates confusion when the homeowner goes to her financial institution to re-negotiate a loan or to enforce a legal right and is unable to learn the true identity of the title holder.<sup>98</sup>

Furthermore, as a result of MERS' involvement with the splitting of mortgage documents, multiple owners have interests in a homeowner's property; therefore, "it may be unclear who has the authority to modify the instrument and arrive at a workout of a troubled loan with the borrower."<sup>99</sup> Essentially, the public records for assignments are no longer updated to contain the most current information a homeowner may need when determining who has an interest in the note or mortgage. In fact, if MERS is expanded to encompass all financial organizations, local record departments that manage assignments will be rendered useless.<sup>100</sup>

Despite the potential negative consequences of mortgagee nominees, such as MERS, financial institutions have two incentives to utilize their services. First, the services make the initial recordings and subsequent assignment transfers easier to record in the county offices,<sup>101</sup> allowing the institutions to lower recording costs.<sup>102</sup> Second, in some jurisdictions, financial institutions are able to allow MERS to bring the foreclosure proceedings, thus preventing a bank from having to assume the responsibility of maintaining a foreclosure action.<sup>103</sup>

Even with these incentives, it is important for legislatures and

95. *Id.*

96. Steven, *supra* note 4, at 256 (citing Beau Phillips, *MERS: The Mortgage Electronic Registration System*, 63 CONSUMER FIN. L. Q. REP. 262, 264).

97. *Id.* (the author is noting that "state laws take disparate views on MERS's standing to foreclose," especially after analyzing *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40, 54 (Mass. 2011) and *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 494 (Minn. 2009)).

98. Korngold, *supra* note 6, at 744.

99. *Id.* at 746 (citing Gretchen Morgenson, *Work Out Problems with Lenders? Try to Find Them*, N.Y. TIMES, July 20, 2008, at A14).

100. *Id.* at 744.

101. Peterson, *supra* note 46, at 1362.

102. *Id.*

103. *Id.*; see also Christopher L. Peterson, *Predatory Structured Finance*, 38 CARDOZO L. REV. 2185, 2208-12 (2007).

courts to put an end to the carelessness and fraud that has littered the mortgage securitization system, a system blamed for causing the market collapse.<sup>104</sup> Determining the rules and procedures for a more adequate, efficient, and fair foreclosure process is not an easy task. And, in correcting the system, it is important to remember that there are major economic consequences when corrective actions are taken; these changes must not put further strain on markets or their operations.<sup>105</sup>

### *B. State Classifications*

States that institute strict foreclosure requirements and regulations afford the most protection to the homeowners and put the biggest burden on the financial institutions that bring the foreclosure actions. However, other states take a more lenient approach by having less stringent standards and requirements.

#### 1. Strict Standing Requirements

One of the first factors to consider when determining a state's classification is to look at the state's standing requirements.

The first state to consider when looking at the requirements for standing is Massachusetts. In a recent decision, the Supreme Judicial Court of Massachusetts held that, at the time a foreclosure action is commenced, the mortgage document must specifically identify the mortgage holder, essentially disallowing blank assignments of mortgages without direct proof of the assignment.<sup>106</sup> Under this ruling, MERS is not permitted to bring a blank assignment of a mortgage in Massachusetts. Furthermore, the owner of a mortgage must clearly identify itself as the owner of the note prior to bringing a foreclosure complaint.<sup>107</sup>

Another state to consider is New Jersey, where the Superior Court made a similar finding to Massachusetts. The court held that "MERS, as a nominee, does not have any real interest in the underlying debt, or the

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104. Korngold, *supra* note 6, at 739.

105. *Id.* at 732.

106. U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 53 (Mass. 2011); *see also* Steven, *supra* note 4, at 258 (explaining that "where a mortgage note is blank and does not list the owner of the mortgage, a foreclosure cannot proceed under *Ibanez*").

107. Steven, *supra* note 4, at 259 (citing MASS. GEN. LAWS ANN. TIT. 3, § 244 (2011)). Other states to consider include Oregon and Idaho. *See* OR. REV. STAT. ANN. § 86.752 (renumbered from 86.735 in 2013 by the Legislative Council) (requiring recording of all transfers of the loan); IDAHO CODE ANN. §45-1505(1) (West, Westlaw through the 2014 Second Reg. Sess. of the 62nd Idaho Leg.) (requiring all assignments to be recorded in the counties where the property is located).



mortgage which secured that debt. It acts simply as an agent or ‘straw man’ for the lender.”<sup>108</sup> Thus, without the proper interest, MERS lacks standing to bring the foreclosure complaint in New Jersey.<sup>109</sup> If an institution attempting to bring a foreclosure complaint is not the original mortgagee on the mortgage document, it must prove the entire chain-of-title, establishing how it came into interest of the note and mortgage, similar to Massachusetts.<sup>110</sup> Lastly, New Jersey requires the party bringing the foreclosure action to have the actual note in its possession, while possession of the mortgage document is optional.<sup>111</sup>

New York has taken a similar approach as New Jersey. New York requires the financial institutions to submit both the original note and evidence of assignments in order to establish that it has standing to bring the foreclosure action.<sup>112</sup>

The Supreme Court of Arkansas has also held that MERS does not have any interest in the mortgages it services and, at the most, “[MERS is the] mere agent of the lender [it services].”<sup>113</sup> Thus, MERS does not have standing in Arkansas to bring an action for foreclosure.<sup>114</sup>

Ohio has established that a party attempting to bring a foreclosure complaint needs only the mortgage/security document or the original note; however, a party cannot acquire standing subsequent to filing the foreclosure by receiving the original note after the filing of the complaint.<sup>115</sup> Thus, the party needs to ensure that it has standing prior to

108. Bank of New York v. Raftogianis, 13 A.3d 435, 449 (N.J. Super. Ct. Ch. Div. 2010).

109. Howard, *supra* note 22, § 4 (noting that “a party seeking to foreclose a mortgage must own or control the underlying debt”).

110. *Raftogianis*, 13 A.3d at 452, 455 (noting rule 4:64-1(b)(10) and that dismissal is appropriate in cases where the Plaintiff is unable to establish standing to bring the foreclosure complaint).

111. *Id.* at 455, 458.

112. Howard, *supra* note 22, § 4 (where the authority conducted an analysis of New York laws analyzed in *In re Mims*, 438 B.R. 52 (Bankr. S.D.N.Y. 2010) and 627 Acquisition Co., LLC v. 627 Greenwich, LLC, 927 N.Y.S.2d 23 (N.Y. App. Div. 2011)). However, in *Mortgage Electronic Registration Systems, Inc. v. Coakley*, the court allowed MERS to bring a foreclosure action as long as it held both the Note and the Mortgage at the time of commencement. *Mortg. Elec. Registration Sys., Inc. v. Coakley*, 838 N.Y.S.2d 622, 623-24 (N.Y. App. Div. 2007). Therefore, MERS has more leniency in New York.

113. *Mortg. Elec. Registration Sys. v. Southwest Homes of Arkansas*, 2009 Ark. 152, at 1-3, 301 S.W.3d 1, 2-3 (using the reasoning that “no payments on the underlying debt were ever made to MERS. MERS did not service the loan in any way. It did not oversee payments, delinquency of payments, or administration of the loan in any way.”).

114. *Id.* at 7-8, 301 S.W.3d at 5.

115. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 3 (this case was a landmark decision for Ohio in which the Supreme Court of Ohio determined whether a party could acquire standing subsequent to filing the foreclosure complaint). This new ruling in Ohio provides a more lenient approach than that decided in *In re*

bringing the action in Ohio.<sup>116</sup>

Florida, like Ohio, only requires possession of the original note to have standing to bring a foreclosure action.<sup>117</sup> Florida, however, does allow notes to be indorsed in blank, meaning no chain of title or assignment is needed.<sup>118</sup> Furthermore, as in Ohio, the plaintiff in Florida must prove, at the time of filing the complaint, that it had standing to sue; meaning, lack of standing cannot be cured after the initial filing of the complaint.<sup>119</sup>

## 2. Lenient Standing Requirements

While some states take a strict stance by having more requirements for financial institutions, other states take the opposite approach. For example, Minnesota does not require assignments to be recorded; thus, MERS' procedure of only recording assignments within its personal system is valid.<sup>120</sup> Furthermore, Minnesota allows organizations such as MERS to enforce the note when bringing a foreclosure action, as long as it is acting as a nominee or agent.<sup>121</sup>

Some states go as far as to allow MERS to always foreclose on mortgages. For example, in Nevada, MERS may foreclose on a residential property under the reasoning that the initial financial institution and MERS entered into an agency relationship whereby the institution gave MERS the most leeway in terms of its actions.<sup>122</sup> However, by Nevada requiring the presence of both documents, the homeowner will at least know the true identity of the party that has

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*Foreclosure Cases. In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007) (analyzing Ohio law and deciding that the party attempting to establish standing must have both the mortgage document and the note in its possession).

116. *Schwartzwald*, 2012-Ohio-5017 at ¶ 3.

117. *U.S. Bank Nat'l Ass'n v. Knight*, 90 So. 3d 824, 826 (Fla. Dist. Ct. App. 2012); *see also* *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 172 (Fla. Dist. Ct. App. 2012) (noting that if the "note does not name the plaintiff as the payee, the note must bear a special endorsement in favor of the plaintiff or a blank endorsement").

118. *Knight*, 90 So. 3d at 826.

119. *McLean*, 79 So. 3d at 172; *see also* *Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1285 (Fla. Dist. Ct. App. 2005).

120. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 489-90 (Minn. 2009) (holding that "transfers of the underlying indebtedness do not have to be recorded to foreclose a mortgage").

121. MINN. STAT. ANN. §507.413 (West, Westlaw through the end of the 2014 Reg. Sess.).

122. *Smith v. Cmty. Lending, Inc.*, 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (where the court used the reasoning that "[a]lthough MERS is not in fact the beneficiary, the attempt to name it as such coupled with the [language of the agreement] . . . indicates an intent to give MERS the broadest possible agency on behalf of the owner of the beneficial interest in the underlying debt").

ownership of the debt, instead of it just listing “MERS.”<sup>123</sup>

The state of Florida has some of the most relaxed laws when it comes to standing. Under Florida statutory provisions, any person or entity can enforce a note or mortgage instrument, even if it is not the owner of the instrument or does not have possession of the instrument, as long as it is allowed to enforce the document pursuant to other provisions.<sup>124</sup> Furthermore, a party who is in wrongful possession of the instrument can still enforce it as long as the party has possession of the instrument.<sup>125</sup>

Kansas is similar to Florida in terms of leniency. In order to respond to MERS specifically, Kansas developed a statute just dealing with nominees and the enforcement of security interests.<sup>126</sup> The courts in Kansas have also started to interpret MERS standing arguments more favorably towards MERS. For instance, MERS is now able to bring a foreclosure action in Kansas against a property owner on behalf of the mortgagee for which they are an agent or nominee.<sup>127</sup> However, in a subsequent decision, it was determined that the nominee could only bring a foreclosure action if it is indicated to the nominee from the mortgagee that it should be granted with this power, a partial limitation on the previous decision.<sup>128</sup>

123. Peterson, *supra* note 46, at 1361-62.

124. Steven, *supra* note 4, at 262.

125. Steven, *supra* note 4, at 262-63 (analyzing §673.3011 of the Florida Code); *see also* Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249 (5th Cir. 2013) (analyzing Texas law and generally holding that MERS is not required to hold the note in order to foreclose). North Carolina even allows the financial institution to submit only a photo-copy of the original note; it never has to provide or prove actual possession of the original note that was filed. Courts have allowed these photo-copies without proof or establishment that they are replicas of the original. *See* Howard, *supra* note 22, § 5 (citing Dobson v. Substitute Tr. Servs., Inc., 711 S.E.2d 728 (N.C. Ct. App. 2011)) *see also* Gallant v. Deutsche Bank Nat’l Trust Co., 766 F. Supp. 2d 714, 721 (W.D. Va. 2011) (applying Virginia law) (court generally noted that the mortgagee did not have to produce or insert into record the original note in order to be entitled to foreclose on a property).

126. Steven, *supra* note 4, at 263 (noting KAN. STAT. ANN. § 60-219 (West 2011), which reads that “[i]n an action in which any relief is sought would determine title or affect a security interest in real property, a person who is subject to service of process must be joined as a party if the person is a nominee of record on behalf of a beneficial owner of a claimed interest in the property that is the subject of the action. The nominee need not be a party required to be joined under subsection (a)(1).”).

127. Martinez v. Mortg. Elec. Registration Sys. (*In re Martinez*), 444 B.R. 192, 204-05 (Bankr. D. Kan. 2011).

128. U.S. Bank, N.A. v. Howie, 280 P.3d 225, 226-27 (Kan. Ct. App. 2012) (the court noted that “[g]enerally, a mortgage is unenforceable when it is not held by the same entity that holds the promissory note. However, an exception exists where there is an agency relationship between the holder of the mortgage and the holder of the promissory note.”). Essentially, the note and the mortgage are not split if both the mortgagee and the mortgagee’s nominee hold them.

### 3. Judicial v. Non-Judicial Foreclosure Proceedings

States can also be classified by the amount of judicial oversight the state requires in the foreclosure process. States that allow financial institutions to foreclose on a property with little judicial oversight are said to be “non-judicial foreclosure” states.<sup>129</sup> Essentially, in a non-judicial foreclosure state, the financial institutions exercise the power of sale that is included as a provision in the mortgage document without first consulting with the courts.<sup>130</sup> States that allow non-judicial foreclosures possess a lenient classification. This is obviously in contrast to a “judicial foreclosure” state where the foreclosure is initiated by a complaint for foreclosure filed with the court, directly involving the court and its procedures.<sup>131</sup> States mandating judicial foreclosures have a strict classification when it comes to the formal procedures of the foreclosure process. Currently, a little over half of the states use non-judicial methods when conducting foreclosures, thus making them more common than one may perceive.<sup>132</sup>

In states that operate a non-judicial foreclosure proceeding, the homeowner, in order to apply the strict standards of proof, files an injunction with the court in order to stop or delay the non-judicial foreclosure; the injunction must specify the legal claims and defenses argued by the homeowner.<sup>133</sup> For classification purposes, these non-judicial foreclosure states would be listed under the “lenient” category if it were not for these states’ strict standards of proof that the homeowner can invoke in order to stay the foreclosure sale.

Minnesota is an ideal example of a state that allows non-judicial foreclosure sales.<sup>134</sup> In Minnesota, a financial institution can foreclose on

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129. Renuart, *supra* note 5, at 111.

130. *Id.* at 140 (citing John Rao & Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, NAT’L CONSUMER LAW CENTER, Feb. 2009, at 11, available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/state\\_laws/foreclosing-dream-report.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf)).

131. *Id.* at 139 (citing JOHN RAO et al., FORECLOSURES: DEFENSES, WORKOUTS AND MORTGAGE SERVICING § 4.2.3 at 105, § 4.2.4 at 106 (National Consumer Law Center 3d ed. 2010)). Also, currently 22 states use judicial foreclosure proceedings: Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont and Wisconsin. MORTGAGE BANKERS ASS’N, JUDICIAL VERSUS NON-JUDICIAL FORECLOSURE, available at <http://www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf>.

132. Renuart, *supra* note 5, at 139.

133. Renuart, *supra* note 5, at 141.

134. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 494 (Minn. 2009) (analyzing § 580.02 and § 580.04 of the Minnesota Code).

any property as long as there is not a current action to recover on the note already established, all recording and assignment measures have been met, and the institution has complied with all notice requirements under §580.04 of the Minnesota Code.<sup>135</sup> Furthermore, if an institution fails to comply with any of these requirements, the sale is void.<sup>136</sup>

Some states, such as Massachusetts, place stricter standards on financial institutions when establishing standing prior to bringing a complaint for a foreclosure, but some states still allow for non-judicial foreclosure proceedings.<sup>137</sup> Like Minnesota, Massachusetts also establishes that the mortgagor can stay the foreclosure proceeding by raising proper defenses and obtaining a declaration from the court.<sup>138</sup> However, the homeowner is still able to challenge the sale subsequent to the auction/sale by requesting that the proper title to the property be called into question.<sup>139</sup> For example, where there is a lack of standing and proper title is found to be void, the sale is also voided.<sup>140</sup> Obviously, many other states allow these non-judicial foreclosures; however, each state may differ on procedures and standards the financial institution must follow when initiating a foreclosure.

#### 4. ADR Requirements

Another way of classifying a state's foreclosure laws is to analyze any sort of alternative dispute resolution (ADR) techniques that the courts or statutes implement prior to the foreclosure sale. The use of ADR during the foreclosure process has the potential of saving more homes from going to sale and also benefits the financial institutions by allowing them to more easily recoup some of their losses. As millions of Americans continue to lose their homes to foreclosure, such alternatives may keep people in their homes.<sup>141</sup> Furthermore, the use of ADR helps

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135. MINN. STAT. ANN. §§ 580.02, 580.04 (West, Westlaw through the end of the 2014 Reg. Sess.).

136. *Jackson*, 770 N.W.2d at 494; *see also* *Moore v. Carlson*, 128 N.W. 578, 579 (Minn. 1910).

137. *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40, 49 (Mass. 2011) (noting that there is a statutory power of sale for mortgage holders to foreclose without a judicial authorization).

138. *Id.*; *see also* *Beaton v. Land Ct.*, 326 N.E.2d 302, 307 (Mass. 1975). Interestingly, Massachusetts is also a foreclosure by entry state, where the mortgage holder may peaceably enter a property subsequent to a recording of a certificate noting the entry by foreclosure. *See* MASS. GEN. LAWS ANN. ch. 244, §§ 1-2 (2011).

139. Renuart, *supra* note 5, at 148-49 (analyzing *Novastar Mortg., Inc. v. Saffran*, 948 N.E.2d 917 (Mass. App. Ct. 2011)).

140. *Id.*

141. Nussbaum, *supra* note 9, at 1889.

ensure that only the necessary foreclosure sales occur, which may, in result, help stabilize the economy once again.<sup>142</sup>

The ADR process works by requiring the homeowners to sit down and discuss the mortgage and delinquent payments with the financial institutions.<sup>143</sup> By requiring ADR, courts are essentially forcing the financial institutions to weigh and consider the benefits of a sale against the potential benefits of allowing the homeowner to remain in the home and make reduced payments.<sup>144</sup> Such a process may be particularly helpful in areas with a poor housing market where it may be difficult to re-sell a home and recoup the amount on the note.

Clear objectives for the ADR meetings are required in order to ensure success. In fact, one author has very clearly laid out five objectives that should be followed in the process. First, the ADR process should be used to facilitate more clear communication that may have otherwise been inhibited because of the confusion in the securitization process.<sup>145</sup> Second, the ADR process should “provide oversight of the loan servicers’ conduct” by the courts.<sup>146</sup> Third, the process should allow the courts to educate homeowners about their rights during the process.<sup>147</sup> Fourth, it should allow the courts to better manage a docket littered with foreclosure complaints, especially in areas with judicial foreclosure proceedings.<sup>148</sup> Fifth, the process allows the courts to manage the image of the community by allowing more homes to be occupied.<sup>149</sup>

Oftentimes, however, in order for the ADR process to be successful, the foreclosure complaint must be stayed or removed from active docket because it is counter-intuitive to allow a financial institution to continue with a foreclosure while at the same time negotiating alternatives.<sup>150</sup> Alternative resolutions may in fact help more homeowners stay in their homes, while still allowing the financial institutions to recoup some of their losses under the default.

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142. *Id.* at 1908. For an example of a statutory requirement for mediation, see Vermont’s statute regarding “Opportunity to Mediate.” VT. STAT. ANN. tit. 12, § 4632 (2013).

143. Nussbaum, *supra* note 9, at 1908.

144. *Id.*

145. *Id.* at 1909.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1924.

### *C. Some Courts Still Remain Undecided*

Some states have yet to set standards concerning some aspects of the foreclosure process; for example, standards on who may bring a foreclosure action or what requirements will be used for standing.<sup>151</sup> Therefore, it is crucial to outline the positives and negatives of every aspect of the process while guiding the undecided states, and all others, towards a more uniform system that treats the financial institutions and the homeowners with equality.

The state of Michigan still remains uncertain, even after various court rulings. An intermediate court voided non-judicial foreclosures that were brought by MERS under the state law that requires the “owner of the indebtedness or of an interest in the indebtedness secured by the mortgage” to foreclose.<sup>152</sup> However, subsequent to this decision, the Michigan Supreme Court ruled that record titleholders, such as MERS, were included under the part of the statute that states the “owner. . . of an interest in the indebtedness” may also foreclose on a property.<sup>153</sup> This decision overruled a previous Michigan Supreme Court decision, which interpreted a person owning an interest in the note to mean a party receiving payments under the terms of the note.<sup>154</sup> These two decisions came only seven months apart.<sup>155</sup>

### *D. Negative Aspects of Various Rules and Regulations*

This comment now analyzes the pros and cons of the rules and regulations outlined above and then develops an ideal foreclosure process that embraces efficiency, reliability, and fairness.

#### *1. Judicial Foreclosure*

Even the judicial oversight procedures, some of the concepts discussed above, carry inefficiencies and unfairness towards a homeowner. For example, when a foreclosure goes through a formal judicial proceeding, the process may be slow and cumbersome. This may cause a negative impact on the communities, especially when

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151. See Ntarelli & Golden, *supra* note 83, at 405.

152. *Id.* at 403 (analyzing § 600.3204(1)(d) of the Michigan Code).

153. Residential Funding Co., L.L.C. v. Saurman (*Saurman II*), 805 N.W.2d 183, 184 (Mich. 2011).

154. Residential Funding Co., LLC v. Saurman (*Saurman I*), 807 N.W.2d 412 (Mich. Ct. App. 2011).

155. *Saurman II*, 805 N.W.2d 183 (decided Nov. 16, 2011); *Saurman I*, 807 N.W.2d 412 (decided Oct. 7, 2010).

foreclosures become back-logged and homes sit empty. If the process was performed in a more expedited and efficient manner, homes may fill more quickly, preventing community blight.<sup>156</sup> Furthermore, judicial foreclosure proceedings are extremely inefficient economically, both for the homeowner and for the financial institution.<sup>157</sup>

It is important, however, to weigh all of the negative aspects of a judicial foreclosure proceeding against the negative aspects of a non-judicial foreclosure proceeding.

## 2. Non-Judicial Foreclosure

After analyzing some of the drawbacks of a judicial foreclosure proceeding, the non-judicial foreclosures may seem more efficient; however, such a procedure has just as many, if not more, drawbacks than the judicial proceeding.<sup>158</sup> First, without the oversight of a decree by a judicial officer, titles to property sold improperly may have to be voided, causing great confusion for subsequent purchasers of the property; such a problem may also lead to increases in title insurance for homeowners, especially when purchasing foreclosed homes.<sup>159</sup>

Second, non-judicial foreclosures tend to be more friendly to the lenders and financial institutions than to the homeowners. Essentially, the procedure is set in motion and completed very quickly and puts pressure on the homeowners to slow down or challenge the process.<sup>160</sup>

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156. See Renuart, *supra* note 5, at 174 (further discussing the possible national ramifications of delayed foreclosures in terms of the securitization process and the market activity as a whole). One particular article estimates that homeowners surrounding a vacant, foreclosed home will lose approximately \$1,508 due to a decrease in their home value, while the local community governments will lose approximately \$19,227 through a loss in taxes and fees, along with a shrinking tax base due to lower priced homes. Glenn Setzer, *Foreclosures Cost Lenders, Homeowners, the Community Big Bucks*, MORTGAGE NEWS DAILY (June 2, 2008, 7:00 AM), [http://www.mortgagenewsdaily.com/622008\\_Foreclosure\\_Costs.asp](http://www.mortgagenewsdaily.com/622008_Foreclosure_Costs.asp).

157. See Setzer, *supra* note 156 (noting that the average foreclosure costs financial institutions approximately \$77,935; furthermore, the cost of preventing a foreclosure will cost the homeowner approximately \$3,300).

158. One state in particular, Hawaii, has noticed these drawbacks and has eliminated many uses of non-judicial foreclosure proceedings. See Everett S. Kaneshige & Seth J. Corpuz-Lahne, *The New Foreclosure Law*, 16 HAW. B. J. 4, 5 (2012).

159. Renuart, *supra* note 5, at 174. Such a concept may also require states to adopt or change laws concerning subsequent bonafide purchasers. In one particular case, *Bevilacqua v. Rodriguez*, the Massachusetts Supreme Judicial Court voided a foreclosure sale to a subsequent purchaser, thus removing the homeowner from the home, and the homeowner could not acquire good title. *Bevilacqua v. Rodriguez*, 955 N.E.2d 884, 897 (Mass. 2011). For a more detailed article on the non-judicial affects in Massachusetts, see McMorrow, *supra* note 12.

160. Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 344-45 (2011).



Such challenges require swift action by the homeowner, who may not even be aware of the options they have; furthermore, it places even more financial strain on the homeowner by requiring one to seek immediate legal counsel and advice, as opposed to working directly with a judge through a formal foreclosure proceeding.<sup>161</sup> Swift action may eliminate options for non-foreclosure remedies, such as solutions through mediation.

Third, the non-judicial proceeding may not be as friendly to the lender as some may first perceive. Pursuing an action through a non-judicial proceeding may prevent the financial institutions from pursuing claims after the foreclosure sale, for example, by obtaining a declaration on a deficiency judgment.<sup>162</sup> So while the efficiency and reduced cost of bringing a foreclosure under non-judicial proceedings seems lucrative at first, the popularity of such proceedings may be decreasing.<sup>163</sup>

### 3. Securitization and MERS

Some believe that courts are not keeping up with changing times, especially regarding the mortgage securitization process.<sup>164</sup> These parties are quick to point out the ineffectiveness of requiring the party-in-interest to bring a foreclosure complaint.<sup>165</sup> These parties base their argument around a few concepts. First, the promissory note, or the right to enforce the promissory note, needs to transfer with the mortgage document because a transfer of a mortgage without the right to enforce the note is a nullity.<sup>166</sup> Furthermore, some argue that the rule is pointless because the promissory note could simply be transferred on the eve of trial through a blank assignment.<sup>167</sup> In instances where a financial institution issues a servicer, such as MERS, the servicer technically does not have an interest in the promissory note, i.e. it is not the real party-in-interest; however, these financial institutions are granting the servicers

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161. *Id.* (providing a further explanation of ways non-judicial foreclosure states are attempting to reduce foreclosures, even with the relaxed procedure rules and regulations).

162. *Id.* at 349.

163. Renuart, *supra* note 5, at 179-80 (discussing how states are starting to re-examine non-judicial foreclosures).

164. See Korngold, *supra* note 6, at 727 (indicating the constant changes occurring among financial entities).

165. See Ntarelli & Golden, *supra* note 83, at 402-03 (discussing how there are no real problems when splitting the note).

166. *Id.* at 402 (providing the reason Arizona and California will “allow for a party on both ends of the ‘split’ to foreclose”).

167. *Id.*

the right to foreclose on behalf of the real party-in-interest.<sup>168</sup> Also, while the banks have sufficient information concerning who has an interest in each mortgage and promissory note because of the rise of document records, local filing offices may not have updated records that establish who is the proper party-in-interest.<sup>169</sup> In addition, such a rule prevents an efficient foreclosure process, and it requires more time and money to sort through the complicated transfers and assignments when the original intent was to give the nominee or representative agency the power to bring the foreclosure.<sup>170</sup>

A possible consequence of failing to require parties to prove an interest or that it is the proper party to bring the foreclosure action is that people may obtain free homes without any obligation to pay the debt owed on the home.<sup>171</sup> This is a result of rules such as Ohio's two dismissal rule, where essentially if there are two dismissals (either with or without prejudice) the same claim cannot be re-filed a third time.<sup>172</sup>

#### 4. ADR

While mediation does seem like an advantageous alternative to a foreclosure proceeding, it does have its drawbacks. First, it does not make sense to have a financial institution engaged in mediation talks while at the same time advocating for the foreclosure of the property, because the time and resources will still be spent on the ultimate solution: foreclosure.<sup>173</sup> The constant re-submitting and upkeep of

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168. *Foreclosure: Fifth Circuit Issues Important Wins for Lenders*, 43 REAL EST. L. REP. 1, 2 (Aug. 2013). The Fifth Circuit came to this conclusion after analyzing *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013).

169. Korngold, *supra* note 6, at 744.

170. See Beau Phillips, *MERS: The Mortgage Electronic Registration System*, 63 CONSUMER FIN. L. Q. REP. 262, 273-74 (2009).

171. See W.W. Allen, Annotation, *What Dismissals Preclude a Further Suit, Under Federal and State Rules Regarding Two Dismissals*, 65 A.L.R.2d 642, § 1 (1959) (discussing Ohio's "two dismissal rule" found under Ohio Civ. R. 41(A)(1) and how it pertains to private foreclosure actions).

172. *Id.*

173. Nussbaum, *supra* note 9, at 1924; see also Natarelli & Golden, *supra* note 83, at 405 (noting that "[m]uch of the law regarding MERS, and foreclosure standing generally, is still unclear outside of major foreclosure states (e.g., Florida, Illinois, Indiana, Ohio)"); Peterson, *supra* note 46, at 1361 (noting that "virtually no academic attention has been paid to the one particular company that has been a party in more subprime mortgage loans than any other[.]" referring to MERS); John P. Hunt, Richard Stanton & Nancy Wallace, *Rebalancing Public and Private In the Law of Mortgage Transfer*, 62 AM. U.L. REV. 1529, 1533 (2013) (noting that "in many states it is unclear whether a mortgage buyer must record its interest in order to ensure that its ownership interest in the mortgage is protected from subsequent claimants"). The article also goes on to point out that in many states there can be a conflict between the requirements under real-property law and the state's

financial packets and financial documents may put too much of a burden on the homeowner.<sup>174</sup> Furthermore, mediation can delay what is only the inevitable: foreclosure of the property.<sup>175</sup> Lastly, mediation programs may increase the attorney's fees that the homeowner will ultimately have to pay to the financial institution upon completion of the procedure, whether that completion is by settlement through a loan modification or collection on the foreclosed property.<sup>176</sup>

### *E. Positive Aspects of Various Rules and Regulations*

While some procedures, rules, and other aspects of state foreclosure proceedings put the homeowner at a great disadvantage, some actually create fairness and uniformity. This section analyzes some of the positive aspects of various laws and court rules.

#### 1. Non-Judicial Foreclosure

First, concerning the use of non-judicial foreclosures, one may easily see why some jurisdictions utilize this procedure.<sup>177</sup> The use of non-judicial foreclosure proceedings essentially provides a process that is "quicker, easier, and [a] less costly method to repossess a borrower's home [compared to a judicial proceeding]."<sup>178</sup> While foreclosure proceedings that require judicial decrees could ultimately take years to go through the court, non-judicial foreclosure proceedings can conclude in 20 to 120 days, depending on the jurisdiction and the statutory language governing the proceeding.<sup>179</sup> Also, the use of non-judicial foreclosure proceedings allows for the use of "self-policing" complaints, whereby the foreclosing party must ensure that they are the proper holder and owner of the note and mortgage; failure to do so could result in the foreclosure being overturned, benefiting the homeowner.<sup>180</sup>

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version of Article 9. *Id.* at 1561.

174. Nussbaum, *supra* note 9, at 1924-25.

175. *Id.* at 1925.

176. *Id.* at 1919-20 (noting that even without attorneys, the mandating of ADR will still be beneficial to both parties).

177. An example is the state of Massachusetts, where the Supreme Judicial Court has ruled on the admissibility of statutory foreclosures that do not require a judicial decree. *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40, 49 (Mass. 2011).

178. Renuart, *supra* note 5, at 171.

179. Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 150-51 (2006).

180. Renuart, *supra* note 5, at 173. Also, a homeowner who is able to establish that he or she has been wrongfully foreclosed upon may have a tort action against the foreclosing entity. *See*

Furthermore, some states allow non-judicial foreclosures with the reason that homeowners are still provided a remedy in the event that there are questions as to true ownership of the promissory note and mortgage. For example, one of the most common remedies is for a mortgagor to file an action with the court that enjoins the foreclosure and allows the process to become a judicial foreclosure, thus allowing the court to have oversight.<sup>181</sup>

## 2. Securitization and MERS

Second, there are positive aspects to allowing MERS to manage mortgage documents and bring foreclosure actions. MERS enables mortgagees to keep recordings, assignments, and history of transfers in one location, and this is especially convenient in instances where the loan or promissory note is sold and the mortgagee still retains the right to be a servicer of the mortgage; such situations create a nightmare when it comes to recording of interests, assignments, and transfers.<sup>182</sup> This system saves the mortgage industry and the financial institutions millions of dollars each year that would be accrued through recording fees and other general processing fees.<sup>183</sup> Furthermore, the system works because the mortgage on record with each county does not need to be changed to reflect each subsequent assignment and transfer; MERS remains as the mortgagee on record with the county.<sup>184</sup> Furthermore, MERS is able to help reduce mortgage fraud by cross-referencing information, which eliminates multiple loans being issued for the same property.<sup>185</sup>

Many states still require the real party-in-interest to bring a foreclosure complaint.<sup>186</sup> Such a requirement can provide major advantages to both the courts and the homeowners. First, such a rule insures that the money owed is going directly to the party entitled to

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James L. Buchwalter, *Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage*, 52 CAUSES ACTION 2d 119, §1 (2012).

181. See *Ibanez*, 941 N.E.2d at 49 (analyzing *Beaton v. Land Ct.*, 326 N.E.2d 302, 307 (Mass. 1975)).

182. Phillips, *supra* note 170, at 263.

183. *Id.*

184. *Id.* For a further explanation concerning the ease with which MERS is able to record documents, see Alvin C. Harrell, *Teaching Consumer Law: Part Four*, 12 J. CONSUMER & COM. L. 8 (2008).

185. Phillips, *supra* note 170, at 264. For more information concerning mortgage fraud as a growing problem in America, see Therese G. Franzén, *Update on Mortgage Fraud—What is Happening Today?*, 62 CONSUMER FIN. L.Q. REP. 14 (2008).

186. See *supra* Part III.A.1.

receive the money owed, e.g. the owner of the debt/obligation.<sup>187</sup> Such a requirement also prevents two parties from laying claim to the debt or obligation, an issue that is easily foreseen due to the constant barrage of trading, buying, and selling of mortgages and promissory notes.<sup>188</sup> Lastly, by requiring the real party-in-interest to bring the action, courts are essentially requiring financial institutions to prove the true title or chain of assignment, ensuring all parties are properly represented.<sup>189</sup> Such a rule also requires transparency among all of the financial institutions, which encourages them to keep proper records and transfer the actual documents.<sup>190</sup> Another reason for this requirement is that it helps establish a uniform system for all financial institutions to follow, which is extremely convenient given the current state of confusion surrounding whether nominees are able to bring foreclosure actions.<sup>191</sup> Also, by having such a requirement, courts are not shielding the financial institutions from liability for tortious actions such as predatory loan practices.<sup>192</sup>

### 3. ADR

Mediation can also be a great tool for courts to utilize; even states utilizing non-judicial foreclosures may still be able to enforce some sort of mediation requirement. Essentially, mediation brings both parties to the table and establishes communication between the borrowers and the financial institutions.<sup>193</sup> Such communication allows for the two parties to consider whether foreclosure is the best route for the homeowner; for example, there may be instances where the homeowner is re-employed and the bank is able to obtain some sort of payment and keep the homeowner in the home.<sup>194</sup> It is also during this time that the

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187. Howard, *supra* note 22, § 2. However, the constant struggle comes in when courts are trying to balance the benefits and popularity of the securitization market, while at the same time, trying to maintain the formality that should be required when determining if someone should be removed from their homes due to a mortgage default. See Davidson, *supra* note 1, at 394.

188. Theoretically, if courts did not have this rule then “there would be a possibility that after a foreclosure the true owner of the loan could come forward rightfully seeking foreclosure on its interest and subject the homeowner to [a double jeopardy concept] . . . making the homeowner pay twice.” Timothy A. Froehle, Note, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1731 (2011).

189. *Id.* at 1734.

190. Korngold, *supra* note 6, at 746.

191. See Davidson, *supra* note 1, at 408-09.

192. See Phillips, *supra* note 170, at 264.

193. Nussbaum, *supra* note 9, at 1901.

194. *Id.* at 1908.

homeowners, courts, and even the institutions themselves can discover if the party bringing the foreclosure action truly has standing, thus saving time down the litigation road.<sup>195</sup> ADR also encourages settlement, thus reducing court docket overload in the hardest hit areas.<sup>196</sup> Lastly, community blight and economic stress would decrease because the system would keep more people in their homes through the use of loan modifications and other settlement resolutions.<sup>197</sup>

#### *F. What Does the Ideal System Look Like?*

After a thorough analysis of the foreclosure process; the way different aspects of the system, such as large nominee firms like MERS, have changed the system; and advantages and disadvantages of various rules and regulations of the foreclosure process, this comment now provides a concept of what the ideal foreclosure process would look like within a uniform system.

It has been said that “[l]aw is not endogenous; it grows in response to the pressures exerted upon it and, as Justice Holmes argued, is shaped less by any inherent logic and more by the accretion of experience.”<sup>198</sup> After five to six years of a continuous mortgage crisis, should we return to a more formalistic foreclosure proceeding?<sup>199</sup> In some regards, this comment advocates for the foreclosure system to return to a more formal system.

#### 1. Formal Judicial Foreclosure System

First, the foreclosure system needs to return to formal judicial proceedings by eliminating the use of non-judicial foreclosures. The judicial system provides the most fairness to both parties. Financial institutions under the judicial system can avoid post-resolution issues and ensure any judgments or money owed by the homeowner can still be collected post-foreclosure.<sup>200</sup> As noted above, there is uncertainty in some jurisdictions as to whether financial institutions can collect on loans that were foreclosed under non-judicial foreclosures.<sup>201</sup> Furthermore, a foreclosure conducted under a judicial proceeding will

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195. *Id.* at 1910.

196. *Id.* at 1912.

197. *Id.* at 1913.

198. Davidson, *supra* note 1, at 430.

199. *Id.* (discussing the possibility of returning to a more formalistic approach).

200. See Renuart, *supra* note 5, at 139-40 (discussing the protection of lenders' rights).

201. See Kaneshige, *supra* note 158, at 5.

ensure the proper party is bringing the foreclosure complaint, by allowing the establishment of chain of titles and assignments.<sup>202</sup> When a bank conducts a foreclosure under the safeguards and supervision of the courts, this is more likely to prevent the financial institution from having to return the home to the homeowner, post-foreclosure, as a result of improper assignments/chain-of-titles or some other defect that may result as a consequence of a non-judicial foreclosure.<sup>203</sup>

Judicial foreclosure proceedings are obviously more fair to homeowners than non-judicial proceedings. Such a formal proceeding, which moves slower than non-judicial foreclosures, provides the homeowner with adequate time to seek legal assistance, even if from free or reduced-fee services such as legal aid.<sup>204</sup> This enables the homeowner to fully investigate the foreclosure and documents to ensure no defenses apply, such as fraud or chain-of-title issues that may arise during a proceeding. Furthermore, by slowing the process down, the system gives the homeowner a chance to obtain new or better employment and a chance to negotiate for a possible settlement, possibly resulting in the homeowner staying in the home and continuing to make payments.<sup>205</sup>

Lastly, formal judicial proceedings are also beneficial to the local communities. Formal proceedings allow people to remain in their homes during the process, thereby reducing blight.<sup>206</sup> If local judicial systems are concerned about overloaded court dockets, these jurisdictions can establish court rules limiting the amount of time a single foreclosure is able to sit on the active docket: for example, one year.

## 2. Less Formal Standing Requirements

Second, while this comment has advocated for more formal foreclosure proceedings, it also advocates for less-formal requirements concerning real party-in-interest criteria. While recognizing the concerns over the real party-in-interest, the courts will be able to ensure proper party participation if conducted under a formal judicial proceeding.<sup>207</sup> Such relaxed standards are necessary given the nature of today's

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202. Renuart, *supra* note 5, at 139-40 (stating that lenders must show title).

203. See Korngold, *supra* note 6, at 742-43 (discussing the courts' attempts to determine chain-of-title).

204. Nussbaum, *supra* note 9, at 1938-41; Renuart, *supra* note 5, at 173-74 (discussing the problems associated with inadequate procedures).

205. Nussbaum, *supra* note 9, at 1953 (discussing the ability to modify loans).

206. *Id.* at 1909.

207. Renuart, *supra* note 5, at 173-74.

securitization process and the consistent use of mortgage servicers. In many cases, as seen above, the real party-in-interest has intended for these nominees and servicers to bring foreclosure complaints, so courts should allow them to bring the case.<sup>208</sup>

Certain procedures can be applied and required in order to safeguard the relaxed party requirements. For example, jurisdictions should require all assignments to be filled in, thus eliminating the use of blank assignments.<sup>209</sup> This will help establish and document the clear chain of title. Furthermore, jurisdictions should require the physical transfer of the original mortgage documents, including both the promissory note and the mortgage document.<sup>210</sup> Possession of these documents will further prove that a party has an interest in the promissory note or is at least the servicer or nominee of the mortgage documents. This will also provide incentives for financial institutions and their nominees/servicers to keep both the promissory note and mortgage together, rather than split them up between different parties.<sup>211</sup> However, the issue concerning whether a nominee should bring a complaint is becoming less relevant because MERS no longer allows parties to bring a complaint in its name, nor will MERS itself bring a foreclosure complaint.<sup>212</sup>

However, this comment does advocate that courts should continue to enforce rules such as the two-dismissal rule, whereby if a complaint is dismissed twice, whether with prejudice or without prejudice, the plaintiff is unable to bring the complaint a third time.<sup>213</sup> Such rules equate to efficiency where the financial institutions will be forced to act more diligently in ensuring they can prove their case. Furthermore, this rule also encourages the banks to enter into settlement agreements that will actually work for the homeowners, because if the settlement agreement fails, it counts as one of the dismissals if it decides to re-file the complaint.<sup>214</sup>

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208. Phillips, *supra* note 170, at 263-64.

209. *Id.* at 262-63 (showing how only MERS keeps the record of transfers).

210. Steven, *supra* note 4, at 254; *see also* Phillips, *supra* note 170, at 263 (stating that physical transfer helps to keep the documents from becoming separated).

211. Steven, *supra* note 4, at 254.

212. *See MERS to Members: Don't Foreclose in Our Name*, HOUSINGWIRE (Feb. 17, 2011, 1:05 AM), <http://www.housingwire.com/articles/mers-members-don%E2%80%99t-foreclose-our-name>.

213. *See* U.S. Bank Nat'l Ass'n v. Gullotta, 120 Ohio St. 3d 399, 2008-Ohio-6268, 899 N.E.2d 987, at ¶¶ 24-25.

214. *See id.* at ¶¶ 14-15



### 3. Mandatory ADR

Third, and finally, this comment advocates for the mandatory use of mediation or other similar ADR techniques. The use of mediation is beneficial to all parties in an action for foreclosure. The banks benefit for a few reasons. First, it allows them time to gather all necessary documents to move forward with the case, in the event of trial, such as obtaining the original mortgage and promissory note documents and completing or establishing the proper chain of title for each document.<sup>215</sup> Second, through a workout program with the homeowner, the financial institution can prevent a loss suffered on a home, especially in a declining population area, because the banks can at least receive some sort of payment on the loan.<sup>216</sup>

Mediation programs are also very beneficial to homeowners for a few different reasons, especially when the courts direct homeowners towards free or reduced-fee legal services. First, the settlements usually allow a homeowner to keep their home and make some sort of monthly payment, usually less than the original principal amount.<sup>217</sup> Such an agreement is particularly useful for homeowners that went through a brief stint of unemployment. However, in order for any sort of mediation program to be effective, the foreclosure action needs to be removed from the active docket to ensure the bank has a continued incentive to work with the homeowner.<sup>218</sup> Mediation can also be very useful for communities because, once again, homeowners will be kept in their homes during the mediation process, thus preventing abandoned homes from being scattered around the community.<sup>219</sup>

After reviewing the advantages and disadvantages of various jurisdictions and their rules and regulations, one can easily see that certain procedural techniques should be favored over others. This suggested process is the most fair, efficient, and effective procedure to conduct a foreclosure procedure.

## IV. CONCLUSION

It is no secret that the financial collapse of recent years has put this country into a poor economic environment. Unfortunately, this environment has helped lead to a major mortgage problem in this

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215. Nussbaum, *supra* note 9, at 1941-42 (discussing the discovery of documents).

216. *Id.* at 1894.

217. *Id.* at 1895.

218. *Id.* at 1924.

219. *Id.* at 1909.

country whereby many Americans are unable to make payments, thus going into foreclosure.<sup>220</sup> Given an analysis of many jurisdictions and the confusion among rulings, many judicial districts were unprepared and blind-sided by such a problem—a problem of massive amounts of foreclosures.<sup>221</sup>

The entire fix of the economic market may very well depend on how the rules of mortgages and foreclosures change and transform.<sup>222</sup> Therefore, as courts and legislatures continue to fix the system and create new laws to prevent future and further fallout from occurring, it is up to legal scholars to determine the best possible routes for turning this archaic security law into a more modern system.<sup>223</sup> The debate and study of the various possible routes, both with the securitization process and the foreclosure process, could very well determine the future success of the economy around the world.

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220. Davidson, *supra* note 1, at 391.

221. Nussbaum, *supra* note 9, at 1906.

222. See Kurt Eggert, *Not Dead Yet: The Surprising Survival of Negotiability*, 66 ARK. L. REV. 145, 147-68 (2013) (discussing how the failure to fix the securitization market now creates a substantial risk for the parties that enter into the securitization loan market).

223. Hunt, *supra* note 173, at 1530.